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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 234

MARIE BENZ, PETITIONER,

vs.

NEW YORK STATE THRUWAY AUTHORITY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JULY 17, 1961
CERTIORARI GRANTED OCTOBER 23, 1961

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STATE OF NEW YORK

Supreme Court

APPELLATE DIVISION—FOURTH DEPARTMENT

MARIE BENZ,

Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant-Respondent.

2

STATEMENT PURSUANT TO RULE 234.

The nature and object of the above entitled action is for recission and/or reformation of a written agreement entered into between the plaintiff and defendant on the ground of the fraud of the defendant or the mutual mistake of the plaintiff and defendant.

The action was commenced by the service of the summons and complaint on the defendant on or about the 23rd day of November, 1959. No answer was interposed and a notice of motion to dismiss the complaint was served on December 10, 1959. 3

The action was brought in the Supreme Court of Erie County, State of New York.

The full names of the original parties are as above set forth. There has been no change of parties herein. The name of the plaintiff's at-

torneys is Rachlin & Rachlin with offices and post-office address at 710 Erie County Bank Bldg., Buffalo, New York. The defendant has appeared specially by Louis J. Lefkowitz, attorney general of the State of New York, whose office and post-office address is The Capitol, Albany, New York. The order appealed from which dismissed the complaint of the plaintiff on the ground that the court lacked jurisdiction of the subject of the action, was entered on the 10th day of March, 1960. Notice of Appeal to this court was served on the 15th day of March, 1960.

NOTICE OF APPEAL.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ERIE

—o—

MARIE BENZ,

Plaintiff.

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant.

—o—

Sir:

PLEASE TAKE NOTICE that Marie Benz, the plaintiff herein, appeals to the Appellate Division of the Supreme Court, Fourth Depart-

ment, from the order made in this action on the 7th day of March, 1960 by Hon. Alfred M. Kramer, Justice of the Supreme Court, and entered in the Office of the Clerk of the County of Erie on the 10th day of March, 1960 granting the motion of New York State Thruway Authority, the defendant, dismissing the complaint of the plaintiff on the ground that the Court has not jurisdiction of the subject of the action, and from each and every part of said order.

Dated: Buffalo, New York, March 15, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff,
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

To:
Louis J. Lefkowitz,
Attorney General,

and

Robert W. Grimm,
County Clerk, Erie County.

ORDER APPEALED FROM.

10 At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in Erie County Hall, Buffalo, New York, on the 4th day of March, 1960.

Present: Honorable Alfred M. Kramer,
Justice.

—o—

MARIE BENZ,
Plaintiff,

11 against

NEW YORK STATE THRUWAY AUTHORITY,
Defendant.

—o—

On reading and filing the notice of motion dated December 10, 1959, and the summons and complaint herein, and after hearing Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendant, by James L. Magavern, of counsel, in support of the motion, and
12 Rachlin & Rachlin, Esqs., attorneys for plaintiff, by Lauren D. Rachlin, Esq., in opposition thereto, and due deliberation having been had thereon, and the Court having rendered its opinion on February 11, 1960, now on motion of Louis J. Lefkowitz, attorney for defendant, it is

ORDERED that defendant's motion to dismiss the complaint be and hereby is granted on the ground that the Court has not jurisdiction of the subject of the action, and it is

Memorandum.

FURTHER ORDERED that the complaint be and hereby is dismissed. 13

Enter:

ALFRED M. KRAMER, *J. S. C.*,
Justice of the Supreme Court.

Granted:
Mar 7 1960.
Nelson M. Johnston,
Sp. Dep. Clerk.

14

MEMORANDUM.

(Same Title.)

Rachlin & Rachlin for Plaintiff.

Louis J. Lefkowitz, Attorney General, appearing specially for the New York State Thruway Authority (James L. Magavern, Deputy Assistant Attorney General, of Counsel) for Defendant.

KRAMER, J. 15

This is an action in equity brought by the plaintiff Marie Benz against the defendant New York State Thruway Authority for rescission and/or reformation of a contract entered into between the plaintiff and the defendant.

The defendant moves to set aside the service of the summons herein on the ground that the court does not have jurisdiction over the person of the defendant or in the alternative to dismiss

the complaint on the ground that the court does not have jurisdiction over the subject matter of the action.

The Court of Appeals in Psaty v. Duryea, 306 N. Y. 413 held that the Supreme Court has no jurisdiction in an action in equity brought against the State, as follows (p. 416):

> "It seems to be conceded that the Court of Claims has, under § 9 of the Court of Claims Act, no jurisdiction to grant strictly equitable relief, but to award money damages only against the State, in appropriate cases. Plaintiffs assert that they, accordingly, could not have obtained relief against the State in the Court of Claims on this claim, since they would have no rights unless and until their bid should be cancelled and rescinded, and that the Court of Claims, being without such equity jurisdiction, could not annul the bid. Therefore, say plaintiffs, they were compelled to bring this suit in equity in the Supreme Court to be relieved from their bid, to have the same declared cancelled, and for an injunction to keep the State officials from putting the money into the State's general funds. Such would be a proper subject for the exercise of the equitable jurisdiction of the Supreme Court were it not for the fact that defendants are sued as officers of the State, dealing, within their powers, with moneys paid to the State, and that, accordingly, this is

a suit against the State under the theory 19
of Samuel Adler, Inc. v. Noyes (285 N. Y. 34), Breen v. Mortgage Comm. of State of N. Y. (285 N. Y. 425), and Niagara Falls Power Co. v. White (292 N. Y. 472). Since, therefore, it is such a suit against the State itself, the Appellate Division was correct in its unanimous dismissal of the suit on the jurisdictional ground since, concededly, the State has not given consent so to be sued. In the Presiding Justice's opinion for the unanimous Appellate Division, it is 20
stated that the broad grant of power given to the Court of Claims in §§ 8, 9 and 12 of the Court of Claims Act 'necessarily implies the right to afford equitable relief where the same may be incidental to a claim for a money judgment'. (282 App. Div. 94, 99). We need not determine the full reach of that statement of law, since appellants' contentions are defeated by the fact that this is a suit against the State itself attempted to be brought in the Supreme 21
Court and, as such, subject to dismissal. We may assume that, in determining claims for money damages against the State, the Court of Claims may apply equitable considerations and perhaps, to some extent, may grant some sort of incidental equitable relief, but that concept has nothing to do with this case since this, in essence and by concession, is not a suit for money damages but, primarily, an equitable action to

22 cancel and rescind a bid which equitable relief, as plaintiffs concede, was essential before there could be any injunction or mandate for the return of the money. In other words, this was a suit for traditional equitable relief, with the return of the money to follow as a consequence of the equitable relief, if granted."

In Easley v. New York State Thruway Authority, 1 N. Y. 2d 374 at p. 376, the Court of Appeals held that the summons was properly set
23 aside and complaint dismissed in an action brought in the Supreme Court to recover damages by reason of the negligence of the defendant New York State Thruway Authority, as follows:

"DESMOND, J. The question is as to the validity of section 361-b of the Public Authorities Law, enacted in 1954, which confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims
24 against the New York State Thruway Authority for alleged torts or breaches of contract. The Thruway Authority is 'a body corporate and politic constituting a public corporation' (Public Authorities Law, § 352) which performs part of the work of the State Government in building and maintaining a highway. It cannot be doubted that this Authority is an arm or agency of the State. The closeness of its relationship (cf. Glassman v. Glassman, 309 N. Y. 436, 441)

to the State is illustrated by these situations among others: its members are appointed by the Governor with the approval of the Senate, its statutory purposes are declared to be 'in all respects for the benefit of the people of the state', its functions are statutorily declared to be 'governmental'; its real property is held in the name of the State, the State advanced the money for constructing the Thruway, the State's Public Works Department designed and supervised the construction work, the legal services are performed by the Attorney General, the Authority must annually report to the Governor and Legislature, its funds are held by the State Comptroller, its bond are guaranteed by the State pursuant to the vote of the People, and, eventually, the Authority's properties will revert to the State itself (see Public Authorities Law, art. 2, tit. 9; Highway Law, art. XII-a). Since the State as sovereign may assert, waive, or condition at will immunity from suit for itself and its agents (see Matter of Brown v. Board of Trustees of Hamptonburg School Dist., 303 N. Y. 484, 489), the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal. Therefore, the only question here is as to whether the State Constitution so limits the jurisdiction of the

25

26

27

Court of Claims that the Legislature could not validly confer on that court jurisdiction over claims that are asserted not against the State itself but against such an 'Authority'. We see nothing in the language or history of section 23 of article VI of the Constitution to support such a construction."

In Glassman v. Glassman, 309 N. Y. 436 at p. 441 of the opinion, the Court of Appeals states as follows:

"[4] Indeed, plaintiff's brief presents no direct challenge to the System's status as a state agency. Instead, she urges that immunity should be denied the System because, first, she has no other remedy, since the Court of Claims would have no jurisdiction over either an equitable action of this kind (cf. Psaty v. Duryea, *supra*, 306 N. Y. 413, 416-417, 118 N. E. 2d 584, 585-586) or the person of the individual defendant and, second, the System enjoys the powers and privileges of a corporation and, therefore, 'must also accept the responsibilities of a corporation' and be amenable to the jurisdiction of a court of equity. In our view, neither of these contentions can assist plaintiff; the immunity of a state agency is in no way affected by the lack of any other remedy (see Psaty v. Duryea, *supra*, 306 N. Y. 413, 419-420, 118 N. E. 2d 584, 587-588; Buckles v. State of New York, 221 N. Y. 418, 423-424, 117 N. E. 811, 812-

813) or by the fact that the agency is endowed with the powers and privileges of a corporation. (See, *e.g.*, Breen v. Mortgage Commission of State of New York, *supra*, 285 N. Y. 425, 430, 35 N. E. 2d 25, 27; Matter of Hicka, 180 Misc. 173, 175-6, 40 N. Y. S. 2d 267, 269-270; State of Arkansas v. State of Texas, 346 U. S. 368, 370, 74 S. Ct. 109, 98 L. ed. 80)." 31

Adhering to the principles set forth in the cases cited above, this Court is of the opinion that it has no jurisdiction of the subject matter of the action (Rule 106, subd. 1 of the Rules of Civil Practice). 32

Accordingly, defendant's motion to dismiss the complaint on the ground that the Court does not have jurisdiction over the subject matter of the action is granted.

Submit order.

Dated: February 11, 1960.

33

ALFRED M. KRAMER,
Justice of Supreme Court.

SUMMONS.

(Same Title.)

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with

34 this summons, to serve a notice of appearance, on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The plaintiff resides in the County of Erie.

Trial to be held in the County of Erie.

Dated this 18th day of November, 1959.

35

RACHLIN & RACHLIN,
Attorneys for Plaintiff.

COMPLAINT.

(Same Title.)

The plaintiff above named by Rachlin & Rachlin, her attorneys, for her cause of action against the defendant herein alleges:

36 1. That at all times hereinafter mentioned plaintiff was and still is a resident of the Town of Hamburg, County of Erie and State of New York.

2. That at all times hereinafter mentioned defendant was and still is a public corporation organized and existing under the laws of the State of New York, and created pursuant to Chapter 143 of the Laws of 1950.

3. That heretofore and on or about the 10th day of November, 1955, plaintiff and defendant

entered into an agreement in writing, a true 37
copy of which is hereto annexed, marked Exhibit "A" and made a part of this complaint, wherein and whereby the defendant agreed to pay and the plaintiff agreed to accept as compensation for all damages to the plaintiff by reason of the defendant's appropriation of the land of the plaintiff specified therein, the sum of Three Thousand Five Hundred Dollars ($3,500.00).

4. That the lands of the plaintiff thus ap- 38
propriated by the defendant bisected the total tract of land owned by the plaintiff and resulted in the major portion of said land becoming inaccessible to the plaintiff.

5. That one William Hennessy was the agent of the defendant for the negotiation of the price to be paid to the plaintiff for the value of her property appropriated by the defendant.

6. That one William Hennessy was the agent of the defendant for the negotiation of the said 39
agreement marked Exhibit "A" with the plaintiff.

7. That prior to the execution of the said Exhibit "A", and at the time of the execution thereof by the plaintiff, the said William Hennessy represented to the plaintiff that the compensation she was to receive for her said land was to be $3,500.00, plus 90% of the value of that portion of the plaintiff's land which had been severed from that which had frontage on

40 South Park Avenue, plus an additional sum which would compensate the plaintiff for the purchase of an access route to the said rear tract. That at the time of the execution by the plaintiff of the said agreement marked Exhibit "A", the said William Hennessy specifically represented to the plaintiff that the $3,500.00 set forth in Exhibit "A" constituted only a portion of the total compensation which she was to receive.

8. Upon information and belief that at many times subsequent to the execution of the said
41 agreement marked Exhibit "A", the defendant, by its agents, repeated the aforesaid representations, causing the plaintiff to rely thereon.

9. Upon information and belief that the sum of $3,500.00 represents approximately 1/20th of the value of the land appropriated by the defendant.

10. That by mutual mistake of the plaintiff and defendant or by the mistake of the plaintiff and the fraud of defendant in concealing its
42 knowledge thereof, the said contract marked Exhibit "A" was incorrectly drawn and does not state the actual agreement between the parties as hereinabove set forth.

11. That the plaintiff executed the said written agreement believing that it set forth in its terms the actual agreement made between plaintiff and defendant as hereinbefore alleged, and that plaintiff has repeatedly sought to have the

said actual agreement performed by the defendant. 43

12. That on or about the 4th day of November, 1959, plaintiff consulted counsel and was advised for the first time that the said Exhibit "A" purported to be an agreement to pay $3,500.00 for all damages sustained by her by reason of such appropriation, and plaintiff immediately brought this action to reform the agreement to conform to the actual agreement of the parties as hereinbefore set forth.

44

13. That the plaintiff has no adequate remedy at law.

FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION AGAINST THE DEFENDANT HEREIN, PLAINTIFF ALLEGES:

14. Repeats and realleges the allegations contained in paragraphs "1" through "9" inclusive with the same force and effect as if fully set forth herein. 45

15. That the aforesaid representations were false and fraudulent and were known or should have been known to be so by the defendant at the time of making same, and were made by the defendant's agent for the purpose of inducing the plaintiff to enter into the said agreement.

16. That the plaintiff relied on said representations and was thereby induced to enter the said agreement marked Exhibit "A".

46 17. That the plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment against the defendant:

1. That the said agreement marked Exhibit "A" be reformed by adding thereto as a part of the compensation to the plaintiff for the value of the lands appropriated from her by the defendant, 90% of the value of the rear tract of land severed by the defendant's appropriation, 47 plus the cost of securing access thereto.

2. Or in the alternative, that the said agreement marked Exhibit "A" be rescinded and declared null and void because of the fraudulent misrepresentation and mistake set forth herein.

3. That plaintiff have such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

48

RACHLIN & RACHLIN,
Attorneys for Plaintiff.

(Verified by plaintiff on November 18, 1959.)

EXHIBIT A ANNEXED TO COMPLAINT.

NEW YORK STATE THRUWAY AUTHORITY

RIGHTS OF WAY AND CLAIMS

CLAIMANT

AGREEMENT OF ADJUSTMENT

Project N. Y. S. Thruway—Erie Section—Sub. Div. #Ec.

Map No. 639 Parcel No (s) 639
Map No. 644 Parcel No (s) 644
Map No. 646 Parcel No (s) 646

County Erie
Town Hamburg
City or Village

THIS AGREEMENT, made this 10th day of November, 1955 between Marie Benz, residing @ 320 E. Main Hamburg, N. Y. hereinafter referred to as "the first party" and the New York State Thruway Authority, hereinafter referred to as "the second party", pursuant to Article 2, Title 9 of the Public Authorities Law and Article XII-A of the Highway Law.

WITNESSETH:

WHEREAS, pursuant to the aforementioned statute, the Superintendent of Public Works of the State of New York hereinafter referred to as "the State" is appropriating or has appropriated, for the purpose of the above identified project, certain property shown and described on the above designated map(s); and

Exhibit A annexed to Complaint.

52 WHEREAS, the first party was, at the time of said appropriation, the owner of the property affected by said appropriation or of same right, title or interest therein;

NOW, THEREFORE, it is understood and agreed by and between the parties hereto as follows:

1. The compensation to be paid by the second party for the total value of the property so appropriated and for all legal damages caused
53 by such appropriation, including all damages incurred by virtue and during the pendency of said appropriation proceedings, and including all damages to the remainder of said affected property of which the appropriated area formed a part, whether caused by said appropriation or by the use of said appropriated property, excepting the aggregate value, if any, of claims hereinafter specifically excluded, is the sum of Three Thousand Five Hundred and no/100 Dollars ($3500.00/00).

54 2. The first party agrees, as a prerequisite to such payment, to execute and deliver or cause the execution and delivery to the Attorney-General of all formal papers which the Attorney-General deems necessary to authorize payment and to secure to the New York State Thruway Authority, The People of the State of New York and the said Superintendent of Public Works a full release of all claims by reason of the aforementioned appropriation and by reason of any estate or interest in the streams, lakes, streets,

roads, highways or rights of way, if any, adjacent to or abutting on the above mentioned property required for the purposes of said project.

3. The aforesaid compensation is to be paid hereunder only upon approval by the Comptroller of the State of New York and upon certificate of the Attorney-General of the State of New York as required by law.

4. This agreement is exclusive of the claims, if any, of persons other than owners of the appropriated property, their tenants, mortgagees and lienors, having any right or interest in any stream, lake, street, road, highway or right of way, or the bed thereof, within the limits of the appropriated property or contiguous thereto.

5. This agreement is also exclusive of claims, if any, for the value of or damage to easements and appurtenant facilities for the construction, operation and maintenance of public service electric, telephone and telegraph, pipe and railroad lines.

6. The amount agreed upon herein as compensation shall be binding and conclusive on the parties hereto in any action or proceeding with relation to the aforesaid appropriation as representing the total value of the property so appropriated, together with all legal damages caused by or consequent upon such appropriation, as aforesaid.

7. This agreement is also exclusive of any claim of others under any lease covering oil, gas or mineral rights provided that at the time

Exhibit A annexed to Complaint.

title to property shown on said map(s) vested in State such instrument or any assignment thereof, has been on public record not less than six years and that there is no physical indication of work thereunder for a like period.

THIS AGREEMENT shall inure to the benefit of and bind the distributees, legal representatives, successors and assigns of the first party.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the day and year first above written.

MARIE BENZ.

William Hennessy,
(Witness)
Silver Creek, New York.
(Address)

NEW YORK STATE THRUWAY AUTHORITY,

By P. G. BALDWIN.
(Director, Rights of Way and Claims)

DEC 5 1955

LAND ACCOUNT #1.

Approved Dec 19 1955,
W. Kelly,
For the State Comptroller.
JW.

NOTICE OF MOTION.

(Same Title.) 61

Sirs:

PLEASE TAKE NOTICE that upon the summons and complaint herein the undersigned, appearing specially for the New York State Thruway Authority, pursuant to Section 237-a of the Civil Practice Act, will move this Court at a Special Term thereof to be held in and for the County of Erie in Erie County Hall, Buffalo, New York, on December 28, 1959, at 10:00 A. M. to set aside the service of the summons herein 62 on the ground that the Court does not have jurisdiction over the person of defendant, or in the alternative, to dismiss the complaint on the ground that the Court does not have jurisdiction over the subject matter of the action, and for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 65 of the Rules of Civil Practice you are required to file with the Court on the 63 return date hereof the originals of the summons and complaint herein.

Dated: Albany, New York, December 10, 1959.

LOUIS J. LEFKOWITZ,
Attorney General,
Appearing specially for the New York State Thruway Auth.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff.

STIPULATION WAIVING CERTIFICATION.

64 (Same Title.)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the within record contains true and correct copies of all the original papers, and of the whole thereof, which were used in the Court below and are specified in the Order of the Hon. Albert M. Kramer, granted March 7, 1960, and entered in the Office of the Clerk of the County of Erie on March 10, 1960, and that the
65 same may be filed as the record on appeal, and certification thereof by the Erie County Clerk is hereby waived.

Dated: Buffalo, New York, April ...., 1960.

RACHLIN & RACHLIN,
Attorneys for Appellant.

LOUIS J. LEFKOWITZ,
Attorney for Respondent.

66

NOTICE OF APPEAL.

STATE OF NEW YORK 67
COURT OF APPEALS

———o———

MARIE BENZ,
Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Defendant-Respondent.

———o——— 68

Sirs:

PLEASE TAKE NOTICE, that pursuant to permission granted by this Court by order dated the 6th day of October, 1960, plaintiff hereby appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court, Fourth Department, entered in the Office of the Clerk of that Court on the 1st day of July, 1960, affirming the order herein of the Supreme Court, Erie County, entered in the Office of the Clerk 69
of the County of Erie on the 10th day of March, 1960.

Dated: Buffalo, New York, October 13, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff-Appellant.
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

Notice of Appeal.

70 To:

Louis J. Lefkowitz, Esq.,
Attorney General,
The Capitol,
Albany, New York.

Robert W. Grimm, Esq.,
County Clerk, Erie County,
Erie County Hall,
Buffalo, New York.

71

72

NOTICE OF APPEAL FROM JUDGMENT.

COURT OF APPEALS

OF THE

STATE OF NEW YORK

—o—

MARIE BENZ,

Plaintiff-Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Defendant-Respondent.

—o—

Sirs:

PLEASE TAKE NOTICE, that pursuant to permission granted by this Court by order dated the 6th day of October, 1960, plaintiff hereby appeals from the judgment of the Supreme Court of the State of New York, entered in the Office of the Clerk of the County of Erie on the 29th day of July, 1960, upon the order of the Appellate Division of the Supreme Court, Fourth Department entered in the Office of the Clerk of that Court on the 1st day of July, 1960, affirming the order herein of the Supreme Court, Erie

Notice of Appeal From Judgment.

70b County, entered in the Office of the Clerk of the County of Erie on the 10th day of March, 1960.

Dated: Buffalo, New York, October 28, 1960.

Yours, etc.,

RACHLIN & RACHLIN,
Attorneys for Plaintiff-Appellant,
Office & P. O. Address,
710 Erie County Bank Bldg.,
Buffalo 2, New York.

71b To:

Louis J. Lefkowitz, Esq.,
Attorney General,
The Capitol,
Albany, New York.

Robert W. Grimm, Esq.,
County Clerk, Erie County,
Erie County Hall,
Buffalo, New York.

72b

ORDER GRANTING LEAVE TO APPEAL.

STATE OF NEW YORK 73

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of October A. D. 1960.

Present: Hon. Charles S. Desmond,
Chief Judge, presiding.

—o—

Mo. No. 455. 74

MARIE BENZ,

Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

—o—

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had: 75

ORDERED, that the said motion be and the same hereby is granted.

A copy

GEARON KIMBALL,
(Seal) *Deputy Clerk.*

ORDER OF AFFIRMANCE.

76 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., commencing on the 29th day of June, 1960.

Present—Hon. Alger A. Williams,
Presiding Justice.

" Earle C. Bastow,
" Philip Halpern,
77 " William E. McClusky,
" Frederic T. Henry,
Associate Justices.

———o———

MARIE BENZ,
Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Respondent.

78 ———o———

The above named Marie Benz, plaintiff in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Supreme Court, entered in the office of the Clerk of the County of Erie, on the 10th day of March, 1960, and the said appeal having been argued by Mr. Lauren D. Rachlin, of counsel for the appellant, and by Mr. Julius L. Sackman, of counsel for the respondent, and due deliberation having been had thereon

Order of Affirmance.

It is hereby ORDERED, That the order so appealed from be, and the same hereby is, unanimously affirmed without costs of this appeal to either party. 79

Enter.

ALGER A. WILLIAMS.

Entered 1st day of July, 1960
Herbert E. Wait,
Clerk.

80

NOTICE OF ENTRY.

Sir:

Take notice that the within is a copy of an order duly filed and entered in the office of the Clerk of App. Div. Fourth Dept., on the 1st day of July, 1960.

Yours, etc.,

LOUIS J. LEFKOWITZ, 81
Attorney General,
Attorney for Respondent.
Office and Post Office Address,
Capitol, Albany 1, N. Y.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff-Appellant.
710 Erie County Bank Bldg.,
Buffalo 2, N. Y.

DECISION AND OPINION OF APPELLATE DIVISION.

82

221. (Erie Co.)—Marie Benz, Appellant, vs. New York State Thruway Authority, Respondent.

—Order unanimously affirmed without costs of this appeal to either party. (Appeal from order of Erie Special Term, Kramer, J., dismissing plaintiff's complaint.) Present: Williams, P. J., Bastow, Halpern, McClusky, and Henry, JJ.

83

84

JUDGMENT.

At a Special Term of the Supreme Court held in and for the County of Erie at the Erie County Hall, Buffalo, New York on the 29th day of July, 1960. 85

Present: Hon. Michael Catalano, *J. S. C.*,
Justice Presiding.

STATE OF NEW YORK

SUPREME COURT—County of Erie

—o—

MARIE BENZ, 86
Plaintiff.

vs.

NEW YORK STATE THRUWAY AUTHORITY,
Defendant.

—o—

The above named plaintiff having appealed to the Appellate Division, Fourth Department, from an Order of the Supreme Court, Erie County, entered in this action on the 10th day of March, 87
1960, and the Appellate Division, Fourth Department, having heard said appeal and ordered and adjudged that the Order so appealed from be affirmed without costs.

NOW, on motion of Louis J. Lefkowitz, attorney for defendant, it is

ADJUDGED, that the Order in this action entered on the 10th day of March, 1960, be and the same hereby is affirmed, and it is further

Judgment.

88 ADJUDGED, that the complaint of the plaintiff herein, be and the same hereby is dismissed, without costs of this appeal to either party.

Enter:

MICHAEL CATALANO,
J. S. C.

Granted:
Jul 29 1960.
V. P. Reilly,
89 Sp. Dep. Clerk.

NOTICE OF ENTRY.

Sir:

Take notice of a Judgment of which the within is a copy, duly granted in the within entitled action, on the 29th day of July, 1960, and duly entered in the office of the Clerk of the County of Erie on the 29th day of July, 1960.

Dated: Buffalo, New York, July 29, 1960.
90

LOUIS J. LEFKOWITZ,
Attorney General,
Attorney for Defendant.
Office and Post Office Address,
Capitol, Albany 1, N. Y.

To:
Rachlin & Rachlin, Esqs.,
Attorneys for Plaintiff.
Office and Post Office Address,
710 Erie County Bank Bldg.,
Buffalo 2, N. Y.

STIPULATION WAIVING CERTIFICATION.

(Same Title.)

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the within record contains true and correct copies of all the original papers, and of the whole thereof, which were used in the Courts below, and the notice of appeal and the judgment of the Appellate Division, as filed in the Erie County Clerk's Office, and that the same may be filed as the record of appeal, and certification thereof by the Erie County Clerk is hereby waived.

Dated: Buffalo, New York, October ...., 1960.

RACHLIN & RACHLIN,
Attorneys for Appellant.

LOUIS J. LEFKOWITZ,
Attorney for Respondent.

[fol. 32]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

MARIE BENZ, Appellant,

v.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

OPINION—Argued March 1, 1961; decided April 27, 1961

Chief Judge DESMOND: The courts below, bound as they were by *Easley* v. *New York State Thruway Auth.* (1 N Y 2d 374), correctly held that the Supreme Court has no jurisdiction of this equity suit (or of the equity suit of *Matheuson* v. *New York State Thruway Auth.*, 9 N Y 2d 788, decided herewith). *Easley* held that the Thruway Authority "is an arm or agency of the State" (p. 376) and that "the Legislature could in creating the Thruway Authority have refused to waive immunity as to it and thus could have forbidden suits to be maintained against the Authority in any court or tribunal" (pp. 376-377). Easley's brief on his appeal to this court made (and we rejected) the identical arguments now made by appellant Benz. The *Easley* decision necessarily meant that there is no jurisdiction in any court of any suit against the Thruway Authority except as the Legislature has in terms created such jurisdiction.

There are just two statutory grants of jurisdiction to sue the Authority. One of them, section 361-b of the Public Authorities Law, discussed in *Easley* (*supra*), confers exclusive jurisdiction upon the Court of Claims to hear and determine all claims against the Authority for alleged torts or breaches of contract. That enactment certainly does not authorize the bringing of these suits in the Supreme Court. The only other statutory grant of jurisdiction to bring actions against the Authority is in subdivision 5 of section 368 of the Public Authorities Law whereby the Legislature in order to permit one particular type of equity

suit against the Thruway Authority enacted a special statute therefor.

[fol. 33] In the *Easley* opinion (*supra*) we described at length the peculiarly close relationship between the Authority and the State itself and we concluded that for purposes of suit the Thruway Authority was part of the State Government and, accordingly, not suable without a direct waiver of immunity. The reasons for that holding were exactly the same as in *Breen* v. *Mortgage Comm.* (285 N. Y. 425) and the reasons why the present suit cannot be maintained against the Authority are the same reasons explained by us in *Breen*. Section 8 of the Court of Claims Act did not, so we directly held in the *Breen* opinion, authorize a suit by Breen in the Supreme Court and this situation was not affected by the statutory direction as to the Mortgage Commission that it may "sue and be sued". The same authorization as to the Thruway Authority (Public Authorities Law, § 354, subd. 1) has no broader meaning.

There may have been some doubt prior to 1954 (see dictum in *Strang* v. *State of New York*, 206 Misc. 734) as to jurisdiction of such suits as these but that doubt was removed by the legislative determination in 1954, before the Authority began to operate the Thruway, that there would be no jurisdiction of suits against the Authority except in the Court of Claims as to tort and contract claims and in the Supreme Court as to certain suits by bondholders (Public Authorities Law, §§ 354, 368). There is no provision anywhere for equity suits against the Thruway Authority. It would indeed be remarkable if the Legislature which "could have forbidden suits to be maintained against the Authority in any court or tribunal" produced a situation where suits at law could be prosecuted (per express enactment) in the Court of Claims only but (by legislative silence) equity suits would be allowed against the Thruway Authority in the Supreme Court. There is no sign that the lawmakers had any such strange intent.

[fol. 34] This leaves plaintiff without any remedy by suit but "the immunity of a state agency is in no way affected

by the lack of any other remedy" (*Glassman* v. *Glassman*, 309 N. Y. 436, 441; see *Psaty* v. *Duryea*, 306 N. Y. 413, 420).

The judgment should be affirmed, without costs.

Van Voorhis, J. (Dissenting). This is an equitable action in the Supreme Court for rescission or reformation of a contract for the sale of land to the New York State Thruway Authority. The complaint alleges that due to mutual mistake or mistake of plaintiff induced by fraud of defendant's agent the purchase price in this contract amounted to approximately 1/20 of the agreed value of the appropriated land. The complaint has been dismissed on motion for lack of jurisdiction on the basis that the Thruway Authority enjoys governmental immunity from suits of this nature. The answer to this question requires examination of the doctrine of governmental immunity and of the decisions on the nature of the Thruway Authority as a public authority.

Section 8 of the Court of Claims Act was amended in 1939 so as to provide: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined *in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations*, provided the claimant complies with the limitations of this article" (italics supplied). This section is held to constitute a waiver of the governmental immunity of all of the civil divisions of the State—counties, cities, towns, villages, and by the same token, public authorities (*Bernardine* v. *City of New York*, 294 N. Y. 361). In the *Bernardine* case this court said (p. 365): "The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed." Ironically this waiver is circumscribed in causes of action against the State itself, due to the circumstance that the State can be sued only in the Court of Claims and section 9 of the Court of Claims [fol. 35] Act has been held to be too narrow to cover jurisdiction over equitable actions (*Psaty* v. *Duryea*, 306 N. Y. 413). This does not alter the fact that all other

governmental units in the State may be sued in the Supreme Court like individuals or private corporations (Court of Claims Act, § 8; *Bernardine* v. *City of New York*, *supra*). Waiver of governmental immunity is a consequence of the "rising tide of criticism against the doctrine of sovereign irresponsibility" (*Miller* v. *Town of Irondequoit*, 243 App. Div. 240, 241, per *Lewis*, J., affd. 268 N. Y. 578). It is not the policy of the courts to restrict the waiver of immunity which has become so firmly a part of the public policy of the State.

Upon the creation of the New York State Thruway Authority in 1950 as "a body corporate and politic" (Public Authorities Law, § 352) with power "To sue and be sued" (Public Authorities Law, § 354, subd. 1), it could be sued in like manner as a private corporation in view of the waiver of immunity from liability ordained by section 8 of the Court of Claims Act expressly applying "to actions in the supreme court" (*Paatess* v. *Saratoga Springs Auth.*, 255 App. Div. 426). Indeed, until the adoption in 1954 of section 361-b of the Public Authorities Law, the Attorney-General's office successfully maintained that the Supreme Court had jurisdiction even of tort claims against the Thruway Authority to the exclusion of the jurisdiction of the Court of Claims (*Strang* v. *State of New York*, 206 Misc. 734).

In 1954 section 361-b was added to the Public Authorities Law purporting to confer upon the Court of Claims exclusive jurisdiction of claims against the Thruway Authority for its tortious acts and for breach of contract. The constitutionality of that section was tested in *Easley* v. *New York State Thruway Auth.* (1 N Y 2d 374) which was [fol. 36] challenged in view of the section added in 1950 to the State Constitution providing that the Court of Claims shall have jurisdiction to hear and determine claims against the State (art. VI, § 23). There was held to be sufficient identity between the Thruway Authority and the State to give effect to section 361-b of the Public Authorities Law notwithstanding this provision in the State Constitution.

Nevertheless, it was recognized in *Matter of Plumbing Assn.* v. *New York State Thruway Auth.* (5 N Y 2d 420, 424) that the *Easley* decision does not mean that the *Thruway* Authority "*is* the State" (italics from original), but

that it is a public corporation "independent and autonomous, deliberately designed to be able to function with a freedom and flexibility not permitted to an ordinary State board, department or commission." (p. 423). If there had been held to be the identity between the State and the Thruway Authority that is asserted on this appeal, the *Plumbing Association* case could not have been decided as it was.

Easley (*supra*) did not hold that actions against the Thruway Authority were forbidden to be maintained in the Supreme Court by section 9 of the Court of Claims Act, but only that causes of action in tort and for breach of contract were required to be prosecuted in the Court of Claims by section 361-b of the Public Authorities Law. Between 1950 and 1954, prior to the enactment of section 361-b, the Thruway Authority could, indeed, be sued only in the Supreme Court. Section 361-b of the Public Authorities Law does not purport (like Court of Claims Act, § 9) to provide that the Thruway Authority is immune from suit except in the Court of Claims. It simply directs, as stated in its title, that exclusive jurisdiction "in certain suits against the authority" is conferred upon the Court of Claims. The Legislature deemed it advisable that claims against the Authority for tort or breach of contracts for [fol. 37] construction, maintenance or operation should be decided in the Court of Claims, as they would be if they concerned ordinary State highways, but the Legislature was careful to state that exclusive jurisdiction in suits against the Authority was vested in the Court of Claims in those instances only. If the intention had been to confer exclusive jurisdiction on the Court of Claims in all instances, it would have been simple to have said so. The reason for the elaboration in the wording of this section is evidently to define the types of suits against the Authority which are cognizable solely by the Court of Claims reserving jurisdiction in the Supreme Court over other causes of action within the general waiver of immunity expressly applicable to it (Court of Claims Act, § 8).

For these reasons, the order was erroneously granted dismissing the complaint on the ground that the Supreme Court has not jurisdiction of the subject of the action and the judgment entered thereon should be reversed.

Judges Dye, Froessel and Foster concur with Chief Judge Desmond; Judge Van Voorhis dissents in an opinion in which Judges Fuld and Burke concur.

Judgment affirmed.

[fol. 38] Triple Certificate to foregoing paper (omitted in printing).

[fol. 39]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

No. 371

MARIE BENZ, Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

REMITTITUR—April 27, 1961

Be it Remembered, that on the 2nd day of November in the year of our Lord 1960, Marie Benz, the appellant - in this cause, came here unto the Court of Appeals, by Rachlin & Rachlin, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department and New York State Thruway Authority, the respondent - in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Lauren D. Rachlin, of counsel for the appellant, and by Mr. Julius L. Sackman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate

Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, April 27, 1961

[Seal—State of N. Y. Court of Appeals]

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 40]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Mo. No. 571

MARIE BENZ, Appellant,

vs.

NEW YORK STATE THRUWAY AUTHORITY, Respondent.

ORDER AMENDING THE REMITTITUR—October 5, 1961

Motion to amend the remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question

under the Constitution of the United States, viz.: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation.

[fol. 41]

No. 371 Form 6

In the Court of Appeals of the State of New York

Witness, The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur—April 27, 1961

[fol. 42]

4 No. 371

Marie Benz, Appellant,

vs.

New York State Thruway Authority, Respondent.

Be it Remembered, That on the 2nd day of November in the year of our Lord one thousand nine hundred and sixty, Marie Benz, the appellant - in this cause, came here unto the Court of Appeals, by Rachlin & Rachlin, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And New York State Thruway Authority, the respondent - in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 43] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Lauren D. Rachlin, of

counsel for the appellant -, and by Mr. Julius L. Sackman, of counsel for the respondent -, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment. The Court of Appeals held there was no such deprivation or violation.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 44] Therefore, it is considered that the said judgment be affirmed, without costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

[fol. 45] Clerks' Certificates to foregoing paper (omitted in printing).

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. 234, October Term, 1961

MARIE BENZ, Petitioner,

vs.

NEW YORK STATE THRUWAY AUTHORITY

ORDER ALLOWING CERTIORARI—October 23, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.